

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 15756 of 2021

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MARGITA INFRA
Versus
NATIONAL E-ASSESSMENT- CENTRE DELHI

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Appearance:

MR D K TRIVEDI(5283) for the Petitioner(s) No. 1
MR DEVARSHI C SHAH(5545) for the Petitioner(s) No. 1
MRS KALPANAK RAVAL(1046) for the Respondent(s) No. 1
MS MAITHILI D MEHTA(3206) for the Respondent(s) No. 2

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CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 09/01/2023

ORAL ORDER
(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

The present petition is preferred under Article 226 and 227 of the Constitution of India where at the time of issuance of notice on 25.10.2021, this Court passed the following order :

“1. Petitioner is regularly assessed to tax by the respondent. For the Assessment Year 2018- 19, income tax was filed on 26.08.2018. On 23.04.2021, he received a show cause notice as to why the assessment be not completed as per the draft



assessment order. He filed the reply for the same on 24.04.2021. Further reply was filed on 06.05.2021. On 03.06.2021, the petitioner received interim letter and then on 14.06.2021, he received a letter from the respondent for compliance. A reply to which had been filed on 02.07.2021 to the interim letter in relation to the scrutiny assessment. The respondent proposed to reject the books of accounts and estimated net profit at the rate of 5.52% of the total turnover. Further reply also had been filed on 09.07.2021 to the said show cause notice. The notice under section 142 also was received from the respondent on 29.07.2021. It was replied to on 09.08.1991. It is the grievance on the part of the petitioner that from the time the show cause notice along with the draft assessment order dated 23.04.2021 was received, which permitted the petitioner to meet the requisition for personal hearing through the video conferencing, he made not less than four times such requests. Not only such request has not been granted, but also the subsequent action on the part of the respondent was of completing the assessment on rejecting his books of accounts and making the addition 50 times more to the income proposed to be assessment under the show cause notice, which deserves indulgence.

2. Prayer sought for are as follows:- "III.PRAYER:

(A) Issue a writ of certiorari and/or a writ of

mandamus and/or any other writ direction or order to quash and set aside the impugned Assessment order alongwith computation sheet and demand notice dated 23/09.2021 under section 144 read with Section 144B of the Income-tax Act, 1961, it being ex-facie illegal and unsustainable in law, annexed hereto at Annexure-'O'

(B) Pending admission, hearing, and disposal of this petition, ad-interim relief be granted and the Respondent be ordered to restrain from enforcing compliance of the impugned Assessment order alongwith computation sheet and demand notice dated 23/09.2021 under section 144 read with Section 144B of the Income-tax Act, 1961 annexed hereto at Annexure-'O'B. The operation, implementation and execution of the said assessment order be stayed pending this Petition.

(C) Award the cost of this petition.

(D) Grant such other and further reliefs as this Hon'ble Court deems fit."

3.Issue notice returnable on 16.11.2021. 4.Operation and implementation of the assessment order and the notice dated 23.09.2021 shall be stayed till the returnable date.

5.Direct service by way of speed post is permitted."

2. Affidavit-in-reply is filed by the respondent, denying each and every allegations made and contentions raised in the memo of the petition.

3. According to the respondent, the additions have been made as per the provisions of Sections 145(3), 68, 69A and 36(1) (iii) of the I.T Act and following the procedure of faceless assessment scheme under Section 144B of the I.T Act.

4. It is further contended that reply forwarded by the Assessing Officer against the objections raised by the assessee during the course of the assessment proceedings are self-explanatory. The objections were duly considered by the Assessing Officer of the ReFAC vide letter dated 22.9.2021, including the rejections of the VC request, whereby it was communicated that there is no legal aspect to be heard and therefore, the request for the video conference is rejected. It is reiterated that in the faceless assessment, without proper and complete details the case could not be discussed with the assessee through video conference.

5. According to the respondent, the assessment order is passed as per the provisions of the I.T Act and guidelines issued by the CBDT from time to time. There are efficacious remedy available and instead of approaching this Court the petitioner should be relegated to the same.

6. We have heard the learned advocates on both the sides. We could also notice at the time of issuance of notice that it is a serious grievance on the part of the petitioner that he made the request for not less than 4 times to hear through video conference and there were various reasons for such insistence. The subsequent action on the part of the respondent of completing the assessment on rejecting the books of accounts and making the addition 50 times more to the income proposed to be assessed would surely need to be regarded.

7. Communication of 22.9.2021 is quite clear that the same is in response to the request from petitioner's side being of 18.9.2021. The said request of the petitioner has been rejected on the ground that there is no legal aspect to be heard of. The proposed additions are a matter of fact duly placed before this court. It is not for the officer concerned to decide as to whether there is anything to be considered or not to be considered without any material having come before him or before he allows the audience to the party concerned. This was a faceless assessment, for which, the provision has been extensively done. Reference will be to Section 144 B which speaks of the faceless assessment. This Court has extensively dealt with this issue in case of **Gandhi Realty (India) Pvt.**

Ltd. Vs Assistant/Joint/Deputy/ Assistant Commissioner of Income Tax/Income Tax Officer.

441 ITR 316. Noticing the fact that the provision itself permits the assessee to have right to seek the audience and once denied when repeatedly asked for is surely is the reason for this Court to hold that the order which has been passed is in breach of principles of natural justice, therefore, deserves to be quashed. The matter shall be heard from the stage at which it was left. The next date of hearing be given by the respondent through the e-mail to the petitioner which shall without seeking any further adjournment. The petitioner shall proceed with the hearing and following the prescribed procedure the respondent shall decide.

Relevant paras are as under :

7.05. It is pertinent to note that this introduction of faceless assessment under Section 144B has revolutionised the very regime of assessment in very many ways and at the same time, there are bound to be certain hiccups while implementing and creases also to be ironed out at the level of department. For the officials and assessee also, acceptance of change, its comprehension and implementation in true purport is a challenge as well.

7.06. Various issues arise in relation to the implementation of this provision, some due to limitation in comprehension, other for want of

requisite training after its introduction and still others are begging the change of mindset.

7.07. This provision starts with non-obstant clause and it warrants service of notice to the assessee in case of scrutiny assessment under section 143(3) and 144(2) be replied to by the assessee in 15 days' time, after allocation through automated system to any Regional Faceless Centre.

7.08. For fulfilling the need of document etc. the request of an assessment unit from regional faceless centre also shall be through Faceless Assessment Centre.

7.8.1. Once there is a need to make reference to verification unit or technical unit, it is necessarily to be done through NFAC only and in absence of any response of assessee, the NFAC would serve a notice under section 144 of the I.T. Act as to why the best judgement assessment be not finalised and still if nor responsive, the concerned unit which is allocated the assessment would need to prepare draft assessment order to be sent to NFAC and even when information called for, in clause (xii) have been received, the draft assessment order needs to be prepared with or without variations as ends also specifying penalty, if any.

7.09. The National Faceless Assessment Centre shall examine the draft assessment order in accordance with the risk management strategy specified by the Board, if there is variation prejudicial to the interest of the assessee, it can finalise the assessment and serve copy of the order and notice to the assessee for initiating penalty proceedings, or for refund of any amount. However, when there is question of any variation, which may prove to be prejudicial to the interest of assessee, it is obligated to provide an opportunity to the assessee by serving a notice and calling upon him to show cause as to why proposed variation be not made or it has the third option of sending it back to the Regional Faceless Assessment Centre for conducting review of such order;

7.10. It is quite clear from the very provision that the assessee is required to be provided an opportunity once there is a possibility of any variation which may turn prejudicial to the interest of the assessee. What is expected of the NFAC is to serve a notice calling upon the assessee to show cause as to why the proposed variation be not made. This has to be done by furnishing Draft Assessment Order along with show cause notice.

It is in other words, statutory obligation of the to serve upon the assessee the show cause notice along with the draft assessment order for the assessee to be availed the opportunity with regard to the variation proposed. It goes without saying that calling upon the assessee as provided under clause (v) or (vi) or (viii) and availing opportunity thereunder or its failure to utilise such opportunity or its failure to response would not permit NFAC or any authority to finalize the assessment once there is a variation proposed, prejudicial to the interest of the assessee.

*7.11. With the advent of technology and with resorting to virtual mode, more meticulous conduct is expected from all concerned. Technology has made it extremely easy the aspect of service of notice, order, draft order etc. and here in Faceless Regime, placing in assaessee's registered account, sending to the e-mail or uploading in mobile APP, is a due service which can never be missed and its trail is easily found, therefore, service or non-service also is no longer an issue and the time and place of dispatch and receipt of electronic record is detained in accordance with the provisions of **section 13** of the Information Technology Act, 2000..*

*7.12. Sub-section (9) of **section 144B** clearly provides that the assessment would be non-est if the said provision is not followed procedurally on or after 01.04.2021. This depicts a clear legislative intent that every step and stage of procedural requirement of this provision is needed to be regarded with matching seriousness.*

8. The Orissa High Court in the case of *Sribasta Kumar Versus Union of India and another* in WP © No.29279 of 2021, was examining the issue where principal ground on which the assessment order had been challenged that was, that the mandatory requirement under **section 144B** of the Act has not been complied with prior to issuance of the assessment order, wherein the Court held thus:

"5. It is obvious that in the present case the impugned assessment order was passed without communicating to the Petitioner any draft order of assessment under **Section 144B** of the IT Act.

6. In view of the clear legal position explained in the above judgments, on the above short ground this Court sets aside the impugned order of assessment dated 8th September, 2021 of the NFAC as well as all consequential notices/orders. The Court nevertheless grants liberty to the Department to pass a fresh assessment order for the AY 2017-18 after complying with the requirement of the law by giving the Petitioner a personal hearing at a date and time, which should be communicated to the Petitioner sufficiently in advance. It is needless to say that the Petitioner assessee will cooperate in the fresh assessment proceedings and furnish all the documents and information as are available with it relevant to the proceedings."

9. The Delhi High Court in W.P.(C) 5849/2021 in the case of *Gurgaon Realtech Limited versus National Faceless Assessment Centre Delhi (Earlier national E- assessment Centre Delhi)*, delivered on 04.06.2021 was considering the identical issue where challenge to the assessment order was passed on the ground of the same having been passed without jurisdiction. Following are the findings and observations which deserve reproduction.

"9. We have considered the submissions made by the learned counsel for the parties.

*9.1. To our minds, if the challenge to the assessment order is made on the ground that it was passed without jurisdiction, then, notwithstanding the fact that an appeal was filed, albeit, only to ensure that the limitation is not crossed, is not an impediment in proceeding ahead with the matter. In this particular case, the reason that we are proceeding ahead with the matter, is that, we are persuaded by the arguments advanced by Mr. Vohra that the impugned assessment order dated 15.04.2021 could not have been passed under **Section 143(3A)** and **143(3B)** after March 31, 2021, having regard to the provisions of **Section 143(3D)** of the Act. For the sake of convenience. the said provisions are extracted below:*

*"**Section 143. Assessment (3A)** The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of making assessment of total income or loss of the assessee under sub-section (3) so as to impart greater efficiency, transparency and accountability by*

- (a) eliminating the interface between the Assessing Officer and the assessee in the course of proceedings to the extent technologically feasible;*
- (b) optimising utilisation of the resources through economics of scale and functional specialisation*
- (c) introducing a team-based assessment with dynamic jurisdiction.*

*(3B) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (3A), by notification in the Official Gazette, direct that any of the provisions of this Act relating to account of total income or loss shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification. Provided that no direction shall be issued after the 31st day of March, 2021. **(3D)** Nothing contained in sub-section (3A) and sub-section (3B) shall apply to the assessment made under sub-section (3) or under **section 144**, as the*

case may be, on or after the 1st day of April, 2021) 9.2. Besides this, Mr. Vohra is also right in his contention that the CBDT notification dated 31.03.2021, to which, we have made a reference. hereinabove, also says, in effect, the same thing, i.c., that after 01.04.2021, the assessment order could have only have been passed in consonance with the provisions of **Section 144B** of the Act.

10. In view of the foregoing reasons, we are inclined to set aside the impugned assessment order dated 15.04.2021 as also the notice of demand issued under **Section 156** of the Act and the notice for initiating penalty) proceedings issued under **Section 274** read with **Section 270A** of the Act.

10.1. That being said, the respondent/revenue will have liberty to proceed with the assessment process, albeit, under the provisions of **Section 144B** of the Act. Needless to add, if a show cause notice-cum-draft assessment order is served on the petitioner, an opportunity would be given to the petitioner to file its response/objections to the same. Furthermore, if there is a variation proposed in the income of the petitioner, an opportunity of personal hearing will also be accorded. In sum, the procedure prescribed under **Section 144B** of the Act will be followed by the respondent/revenue."

10. The Delhi High Court in the case of *in W.P.(C) 6662/2021 in the case of Rani Promotors Private Rotomoter Pvt. Ltd. Versus Additional Commissioner of Income Tax* on 19th July, 2021 also considered the same question. The court availing an opportunity of hearing be set aside the impugned order which was passed availing such opportunity. Relevant paragraphs of the aforesaid decisions read thus:

"12. In any event, this issue is no longer res integra as a Coordinate Bench of this Court in *Gurgaon Realtech Limited v. National Faceless Assessment Centre Delhi*, W.P. (C) 5849/2021 has held that the

Assessment Order could not have been passed under Section 143(3A) and 143(3B) of the Act by the Revenue after 31st March, 2021 having regard to Section 143(3D) of the Act.

8. One of the grounds of challenge is that assessment order is also contrary to the scheme of I.T Act because the additions are made beyond the scope and issues in the show cause notice resulting in actual income assessed at 50 times then proposed to be assessed in the show cause notice. Thus, on both the counts non-grant of virtual hearing, though asked for repeatedly by the petitioner, and because the additions are made beyond the scope and issue of the show cause notice, the final assessment order passed deserves to be interfered with.

9. Resultantly assesment order dated 23.9.2021 and the demand notice issued under Section 144 of the self same date are hereby quashed and set aside giving the permission to the respondent to issue a fresh show cause notice. All contentions available under the law would be open for the petitioner to be raised in the fresh proceedings.

(SONIA GOKANI, J)

(SANDEEP N. BHATT,J)

MARY VADAKKAN